

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST

AGENDA REQUESTED: September 27, 2023

DATE OF REQUEST: September 7, 2023

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Garrett T. Arthur (512) 239-5757

CAPTION: Docket No. 2023-0808-MIS. Discussion of the Office of Public Interest Counsel's Annual Report to the Commission made pursuant to Texas Water Code, Section 5.2725, Annual Report; Performance Measures.

A handwritten signature in black ink, appearing to read "Garrett T. Arthur", written over a horizontal line.

**Garrett T. Arthur,
Public Interest Counsel**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S ANNUAL REPORT TO THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
FOR FISCAL YEAR 2023**

I. INTRODUCTION

Texas Water Code, Chapter 5, Subchapter G prescribes the role, responsibilities, and duties of the Office of Public Interest Counsel (OPIC or Office) at the Texas Commission on Environmental Quality (TCEQ or Commission). Included among these statutory duties is the requirement under Texas Water Code § 5.2725 for OPIC to make an Annual Report to the Commission containing:

1. An evaluation of the Office's performance in representing the public interest;
2. An assessment of the budget needs of the Office, including the need to contract for outside expertise; and
3. Any legislative or regulatory changes recommended pursuant to § 5.273.

Accordingly, OPIC respectfully submits this Annual Report to comply with the requirements of Texas Water Code § 5.2725.

OPIC was created in 1977 to ensure that the Commission promotes the public's interest. To fulfill the statutory directive of Texas Water Code § 5.271, OPIC participates in contested case hearings and other Commission proceedings to help develop a complete record for the Commission to consider in its decision-making process. In these proceedings, OPIC develops positions and recommendations supported by applicable law and the best available information and evidence. OPIC also advocates for meaningful public participation in the decision-making process of the Commission to the fullest extent authorized by the law. The Office works independently of other TCEQ divisions and parties to present a public interest perspective on matters that come before the Commission. OPIC does this work through activities that include:

- Participating as a party in contested case hearings;
- Preparing briefs for Commission consideration regarding hearing requests, requests for reconsideration, motions to overturn, motions for rehearing, use determination appeals, and various other matters set for briefing by the Office of General Counsel;

- Reviewing and commenting on rulemaking proposals and petitions;
- Reviewing and recommending action on other matters considered by the Commission, including proposed enforcement orders and proposed orders on district matters;
- Participating in public meetings on permit applications with significant public interest; and
- Responding to inquiries from the public related to agency public participation procedures and other legal questions related to statutes and regulations relevant to the agency.

As a party to Commission proceedings, OPIC is committed to providing independent analysis and recommendations that serve the integrity of the public participation and hearing process. OPIC is committed to ensuring that relevant information and evidence on issues affecting the public interest are developed and considered in Commission decisions. OPIC's intent is to facilitate informed Commission decisions that protect human health, the environment, the public interest, and the interests of affected members of the public to the maximum extent allowed by applicable law.

The Public Interest Counsel is appointed by the Commission. The Counsel supervises the overall operation of OPIC by managing the Office's budget, hiring and supervising staff, ensuring compliance with agency operating procedures, and establishing and ensuring compliance with Office policies and procedures. OPIC has eight full-time equivalent positions: Public Interest Counsel; Senior Attorney; five Assistant Public Interest Counsels; and the Office's Executive Assistant.

OPIC is committed to fulfilling its statutory duty to represent the public interest in Commission proceedings by hiring, developing, and retaining knowledgeable staff who are dedicated to OPIC's mission. To maintain high quality professional representation of the public interest, OPIC ensures that attorneys in the office receive continuing legal education and other relevant training. OPIC further ensures that its staff undertakes all required agency training and is fully apprised of TCEQ's operating policies and procedures.

II. EVALUATION OF OPIC'S PERFORMANCE

Texas Water Code § 5.2725(a)(1) requires OPIC to provide the Commission with an evaluation of OPIC's performance in representing the public interest. In determining the matters in which the Office will participate, OPIC applies the factors stated in 30 Texas Administrative Code (TAC) § 80.110 (Public Interest Factors) including:

1. The extent to which the action may impact human health;
2. The extent to which the action may impact environmental quality;
3. The extent to which the action may impact the use and enjoyment of property;
4. The extent to which the action may impact the general populace as a whole, rather than impact an individual private interest;
5. The extent and significance of interest expressed in public comment received by the Commission regarding the action;
6. The extent to which the action promotes economic growth and the interests of citizens in the vicinity most likely to be affected by the action;
7. The extent to which the action promotes the conservation or judicious use of the state's natural resources; and
8. The extent to which the action serves Commission policies regarding the need for facilities or services to be authorized by the action.

OPIC's performance measures classify proceedings in four categories: environmental proceedings; district proceedings; rulemaking proceedings; and enforcement proceedings.

For reporting purposes, environmental proceedings include contested case hearing proceedings on permits at the State Office of Administrative Hearings (SOAH) and Commission proceedings related to consideration of hearing requests, requests for reconsideration, motions to overturn, proposals for decision, and other miscellaneous matters heard by the Commission. These proceedings relate to municipal and industrial solid waste and hazardous waste management and disposal activities, underground injection activities, waste disposal wells, water rights authorizations, priority groundwater management area designations, watermaster appointments, industrial wastewater discharge permits, municipal wastewater discharge permits, land application of

wastewater permits, land application of septage and sludge, concentrated animal feeding operations, rock and concrete crushers, concrete batch plant standard permit registrations, facilities requiring state and federal air permits, pollution control equipment use determination appeals, and various authorizations subject to the Commission's motion to overturn process. OPIC also includes permit revocation petitions, appeals of decisions on occupational licenses, and emergency orders in numbers reported for this category.

District proceedings include proceedings at SOAH and at the Commission related to the creation and dissolution of districts, and any other matters within the Commission's jurisdiction relating to the oversight of districts.

Rulemaking proceedings include Commission proceedings related to rulemaking actions, state implementation plans, general permits, rulemaking petitions, and quadrennial rule reviews.

Enforcement proceedings include enforcement contested case hearings active at SOAH and Commission proceedings related to the consideration of proposed orders. For purposes of this report, enforcement proceedings do not include other agreed enforcement orders issued by the Executive Director in matters that were never active cases at SOAH.

A. OPIC's Performance Measures

As required by Texas Water Code § 5.2725(b), the Commission developed the following OPIC performance measures which were implemented on September 1, 2012.

Goal 1:

To provide effective representation of the public interest as a party in all environmental and district proceedings before the TCEQ

Objective

To provide effective representation of the public interest as a party in 75 percent of environmental proceedings and 75 percent of district proceedings heard by the TCEQ

Outcome Measure

Percentage of environmental proceedings and percentage of district proceedings in which OPIC participated

Goal 2:

To provide effective representation of the public interest as a party in all rulemaking proceedings before the TCEQ

Objective

To participate in 75 percent of rulemaking proceedings considered by the TCEQ

Outcome Measure

Percentage of rulemaking proceedings in which OPIC participated

Goal 3:

To provide effective representation of the public interest as a party in all enforcement proceedings before the TCEQ

Objective

To provide effective representation of the public interest as a party in 75 percent of enforcement proceedings heard by the TCEQ

Outcome Measure

Percentage of enforcement proceedings in which OPIC participated

B. FY 2023 Performance

OPIC's performance measures for environmental, district, rulemaking, and enforcement proceedings are expressed as percentages of the proceedings in which OPIC could have participated. OPIC uses a reporting process within the TCEQ Commissioners' Integrated Database (CID) that allows OPIC to track its work on assigned permitting and licensing matters active at any point within a fiscal year. For the fiscal year, OPIC also tracks and records agenda item totals by performance measure category. The proceedings totals are intended to reflect all Commission Agenda items which fall into one of these four categories, plus active OPIC cases that are not captured by Agenda totals.

Performance measure percentages were derived by using information available for FY 2023 as of August 31, 2023. In fiscal year 2023, OPIC participated in a total of 677 proceedings consisting of: 121 environmental

proceedings; 17 district proceedings; 65 rulemaking proceedings; and 474 enforcement proceedings.

OPIC’s participation in 121 of 121 total environmental proceedings resulted in a participation percentage of 100%.

OPIC’s participation in 17 of 17 district proceedings resulted in a participation percentage of 100%.

OPIC’s participation in 65 of 65 rulemaking proceedings, including the review of all petitions, proposals, adoptions, and quadrennial rule reviews considered by the Commission during fiscal year 2023, resulted in a participation percentage of 100%.

OPIC’s participation in 474 of 474 enforcement proceedings, including the review of orders considered at Commission Agendas and the participation in additional cases that were active at SOAH during fiscal year 2023, resulted in a participation percentage of 100%.

III. ASSESSMENT OF BUDGET NEEDS

Texas Water Code § 5.2725(a)(2) directs OPIC to provide the Commission with an assessment of its budget needs, including the need to contract for outside technical expertise. The operating budget for OPIC in fiscal year 2023 was \$655,701 as shown below.

OPIC Budget for FY 2023

Budget Category	Amount
Salaries	\$ 638,701
Travel	\$ 7,100
Training	\$ 5,500
Consumable Supplies	\$ 500
Other Operating Expenses	\$ 1,600
Facilities, Furniture, and Equipment	\$ 2,300
Total	\$ 655,701

A. Outside Technical Support

Texas Water Code § 5.274(b) provides that OPIC may obtain and use outside technical support to carry out its functions. Texas Water Code §5.2725(a)(2) requires this report to include information about OPIC's budget needs to contract for outside technical expertise. The need to retain technical consulting services in contested case hearings rarely becomes apparent in time for OPIC to identify, obtain, and use technical expertise by way of individually negotiated contracts. Also, the complex permit applications OPIC tracks during the comment period often settle prior to hearing. These factors make OPIC reluctant to commit state resources for work on such matters until SOAH proceedings are imminent. As a result, OPIC's initial budget typically does not include funds for temporary and professional services; however, when such needs have been identified, funds are made available through additional funding requests.

OPIC would like to stress that the SB 709 contested case hearing process requires compact timelines which exist regardless of the contract process potentially used to procure outside technical support. It is fair to say that the primary obstacle preventing OPIC from more often obtaining outside technical expertise is the contested case hearing timeline established by SB 709. Under SB 709, the Administrative Law Judge (ALJ) must issue a Proposal for Decision (PFD) no later than 180 days after a preliminary hearing. This time period is further shortened by SOAH reserving 60 of the 180 days for the ALJ to prepare the PFD.

However, as recommended by the Texas Sunset Advisory Commission, OPIC has considered, and will continue to consider, developing and using umbrella contracts to procure expert assistance. Though an umbrella contract could be the right tool for the job in certain circumstances, OPIC finds that developing and using umbrella contracts to procure expert assistance may not be a one-size-fits-all solution. Therefore, OPIC believes it is prudent to pursue a hybrid approach that also includes the use of one-time purchase order contracts to procure outside expert assistance.

OPIC is in contact with the General Law Division (GLD) and the Procurements and Contracts Section (P & C) to discuss the possibility of an expedited purchase order process that can be streamlined for retention of experts. That discussion might also include the use of a contract template that has been preapproved by GLD and P & C and can be used by merely inserting information specific to the expert sought.

In conclusion, OPIC's need to obtain and use outside technical support in a given year is unpredictable. However, even within the time constraints of SB

709, OPIC remains committed to early detection of good candidate cases where outside technical support could help OPIC fulfill its mission.

IV. LEGISLATIVE & REGULATORY CHANGE RECOMMENDATIONS

Texas Water Code § 5.273(b) authorizes OPIC to recommend needed legislative and regulatory changes. Texas Water Code § 5.2725(a)(3) provides that any such recommendations are to be included in OPIC's Annual Report. OPIC's recommended regulatory change is included as Attachment 1 to this report.

V. CONCLUSION

OPIC appreciates this opportunity to review its work and recommits to its statutory directive to protect the public interest.

Attachment 1

OPIC'S REGULATORY CHANGE RECOMMENDATION

- **Proposal Concerning Allotted Time to Prepare PFD in SB 709 Contested Case Hearings**

HB 801 established timeframes for procedural schedules in contested case hearings on applications filed on or after September 1, 1999. For these matters, hearings are required to last no longer than one year from the date of the preliminary hearing until the issuance of the proposal for decision (PFD). No specific timeframe was set for the time between the close of the hearing record and the issuance of the PFD. At least since the implementation of HB 801, Administrative Law Judges (ALJ) at the State Office of Administrative Hearings (SOAH) have reserved a 60-day period following the close of the hearing record for writing and issuing the PFD, though this practice is not expressly addressed by statute or rule applicable to TCEQ environmental permit application hearings.¹

SB 709 established timeframes for procedural schedules in contested case hearings on applications filed on or after September 1, 2015. For these matters, hearings are required to last no longer than 180 days from the first day of the preliminary hearing until the issuance of the PFD. There are no specific statutory requirements in SB 709 regarding the time between the close of the hearing record and the issuance of the PFD.

Because of the statutory limitation on the maximum time period allowed between a preliminary hearing and issuance of the PFD, SOAH's reservation of 60 days of the hearing schedule exclusively for preparation of the PFD negatively affects the rights of members of the public to challenge permit applications. These parties are impaired in their ability to develop and argue the merits of their positions through the contested case hearing process. If the Commission sets the duration of a hearing at 120 days, half of that schedule is reserved by SOAH to prepare the PFD. Even if the Commission sets the duration

¹ Texas Government Code § 2001.058(f)(1) allows a state agency to provide by rule that a proposal for decision in an occupational licensing matter must be filed no later than the 60th day after the latter of the date the hearing is closed or the date by which the judge has ordered all briefs, reply briefs, or other post-hearing documents to be filed. By its wording, this statute applies to occupational licensing matters and not environmental permitting matters subject to HB 801 or SB 709.

Texas Government Code § 2001.143 does provide that decisions or orders that may become final should be signed within 60 days of the close of the hearing. However, in interpreting and implementing this statutory directive for purposes of TCEQ hearings, the Commission adopted 30 TAC § 80.267 which provides that: (a) the Commission shall make its decision 30 days or later following the service of the ALJ's PFD; and (b) the Commission's order (not the ALJ's PFD) should be signed not later than the 60th day after the hearing is finally closed. The rule does not require or reserve a 60-day period for preparing the PFD.

of a hearing at the maximum amount of time statutorily allowed, SOAH's 60-day PFD preparation period consumes one-third of the 180-day schedule.

When an ALJ reserves 60 days (approximately 2 months) to prepare the PFD, this leaves the parties with a maximum of 120 days (approximately 4 months) to: conduct all discovery, including serving and responding to written discovery requests and participating in the depositions of any fact witnesses and testifying expert witnesses; resolve discovery disputes through motions and hearings as necessary; prepare and submit pre-filed testimony and exhibits; file and serve any objections to pre-filed testimony and exhibits; have objections and motions for summary disposition resolved through any needed pre-hearing conferences; conduct the hearing on the merits over a period of days; await the court reporter's transcript of the hearing; and then prepare comprehensive written closing arguments and replies to closing arguments. These aspects of the hearing process must happen sequentially; they must conclude before the record is closed; and the record must close before the 60-day clock for preparation of the PFD begins ticking.

A reallocation of the 180-day time period would serve the public interest by allowing parties more time to develop the evidentiary record and present arguments in support of their respective positions. The public interest would be served by allowing 30 working days, rather than 60 calendar days, from the close of the hearing record until issuance of the PFD.

This proposal is based in part on former 30 TAC § 80.251(b) that applied to applications filed before September 1, 1999. The rule was repealed effective May 19, 2020, after a determination was made that there were no permit applications still pending that were filed before September 1, 1999. Under §80.251(b), ALJ's were required to issue a PFD within 30 working days after the close of the record; though, notably, there was no statutorily mandated restriction on the duration of the hearing. The following changes indicated with underlining and strikethrough would amend the Commission's Chapter 80 rules in 30 TAC §§ 80.105(b)(3), 80.252(c) and/or such other Chapter 80 rules deemed appropriate.

§ 80.105. Preliminary Hearings

- (b) If jurisdiction is established, the judge shall:
 - (1) name the parties;
 - (2) accept public comment in the following matters:
 - (A) enforcement hearings; and

- (B) applications under Texas Water Code (TWC), §11.036 or §11.041 and TWC, Chapter 13;
- (3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes. In contested cases regarding a permit application filed with the commission on or after September 1, 2015 and referred under Texas Water Code § 5.556, the order must include a date for the issuance of the proposal for decision that is within the maximum expected duration set by the commission. For applications referred under Texas Water Code § 5.556 or § 5.557, the date for issuance of the proposal for decision must be no later than the 30th working day after the judge closes the hearing record; and

§ 80.252. Judge's Proposal for Decision

- (a) Any application that is declared administratively complete on or after September 1, 1999, is subject to this section.
- (b) Judge's proposal for decision regarding an application filed before September 1, 2015, applications not referred under Texas Water Code (TWC), §5.556 or §5.557, or applications not subject to TWC, §11.122(b-1). After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than the end of the maximum expected duration set by the commission and shall send a copy by certified mail to the executive director and to each party.
- (c) Judge's proposal for decision regarding an application filed on or after September 1, 2015, and referred under TWC, §5.556 or §5.557. The judge must file a written proposal for decision with the chief clerk no later than 30 working days after the date the judge closes the hearing record. If the judge is unable to file the proposal for decision within 30 working days, the judge must request an extension from the commission by filing a request with the chief clerk. In no event will the proposal for decision be ~~After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no~~ filed later than 180 days after the first day of the preliminary hearing, the date specified by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, §2003.047(e-3). Additionally, the judge shall send a copy by certified mail to the executive director and to each party.